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Summary record (partial)* of the 3526th meeting
Held at the Palais Wilson, Geneva, on Thursday, 26 July 2018, at 3 p.m.

Chair: Ms. Cleveland (Vice-Chair)

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Ms. Cleveland (Vice-Chair) took the Chair.

The meeting was called to order at 3.10 p.m.

Organizational and other matters, including the adoption of the report of the Working Group on Communications (*continued*)

Draft general comment No. 36 on article 6 of the Covenant (Right to life) (*continued*) (CCPR/C/GC/R.36/Rev.7)

1. **The Chair** invited the Committee members to resume their discussion of paragraph 49 of the revised draft general comment (CCPR/C/GC/R.36/Rev.7).

Paragraph 49 (*continued*)

2. **Mr. Muhumuza** proposed replacing "tribal courts" with "community courts" in order to reflect the advancement of society.

3. **Mr. Politi** said that he was concerned by the use of the word "generally" in the second sentence, which implied that the Committee accepted the idea that, under certain circumstances, a court with the power to impose the death penalty could be established after the commission of the offence in question.

4. **Mr. Shany** (Rapporteur for the general comment) said that he proposed removing the reference to tribal courts altogether, rather than replacing it with the term "community courts", which had a specific meaning in some contexts. The word "generally" had been used so as not to imply that trials held in new courts established in exceptional circumstances, such as the International Military Tribunal, ad hoc international tribunals and courts set up following the founding of a new State, were incompatible with international law.

5. **Mr. Heyns** said that Mr. Politi's concern could be addressed by removing the phrase "generally before the commission of the offence" altogether.

6. **Mr. Politi** said that he was not in favour of discarding the phrase, for it was important to define the notion of a competent court. The requirement that the court must have been established prior to the commission of the offence was a fundamental guarantee in criminal law that was enshrined in the constitutions of many States. The precedent that had been set by the post facto establishment of the International Military Tribunal had not been followed subsequently when it came to the application of the death penalty.

7. **Mr. de Frouville** noted that the various ad hoc international tribunals that had been set up in recent years had not had the power to impose the death penalty and were therefore irrelevant to the discussion.

8. **Mr. Shany** said that an example of a court established post facto with the power to hand down death sentences was the Israeli tribunal that had tried Adolf Eichmann. In that case, the State of Israel itself, and therefore the court, had been established after the commission of the offence. It was important not to imply that the application of criminal law by courts established in new States or as part of a new legal system was somehow defective.

9. **Mr. Heyns** said that the stipulation that the court ought to be established by law within the judiciary was an obligation that required the use of the verb "must".

10. **Mr. de Frouville** said that the various concerns that had been raised could be addressed by dividing the second sentence into two sentences that would read: "Such a court must be established by law within the judiciary and must be independent of the executive and legislative branches and impartial. It should be established before the commission of the offence."

11. **Mr. Shany**, summarizing the amendments that had been proposed thus far, said that the second sentence would be divided into two sentences as proposed by Mr. de Frouville; the third sentence would be removed altogether; the fourth sentence would be amended to read "as a rule, civilians must not be tried for capital crimes before military tribunals, and military personnel can only be tried for offences carrying the death penalty before a tribunal

affording all fair trial guarantees"; the reference to tribal courts would be removed; and the words "the most serious capital crimes" would be replaced with "capital crimes".

12. *Paragraph 49, as amended, was adopted.*

Paragraph 50

13. **Mr. Shany** said that paragraph 50 established that a person sentenced to death could not be executed unless all appeal procedures had been exhausted or so long as international interim measures requiring a stay of execution were in place. The Committee had received comments from several countries on the paragraph; for example, the Government of Canada had argued that international interim measures were not binding; the Government of the United States of America had strongly disagreed with the assertion that United Nations treaty bodies were a necessary avenue of recourse; and the Government of Japan had voiced its concern about the possibility that interminable appeal procedures would prevent States from carrying out executions. The Committee believed that States had good faith obligations under the Vienna Convention on the Law of Treaties to give due consideration to the Views of the Committee and to refrain from taking irreversible measures until they had done so. The Committee's position on that matter was in line with the approach taken by the Inter-American Court of Human Rights and the Privy Council.

14. **Mr. Ben Achour** said that the French translation of the first sentence needed to be revised. He proposed translating "final judgment" as "*jugement passé en force de chose jugée*", rather than "*jugement définitif*". In addition, it was not clear what was meant by the term "*grâce privée*" [private pardon] or what non-judicial avenues could be explored once a final judicial decision had been handed down.

15. **Mr. Shany** said that the phrase "non-judicial avenues" covered any non-judicial remedy provided for by law, such as an official pardon granted by a monarch. An example of a private pardon was the concept of *diya* in Islamic law, which was commonly translated as "blood money".

16. **Mr. Santos Pais** proposed amending the first sentence to reflect the fact that supervisory reviews could be conducted by courts as well as prosecutors.

17. **Mr. Heyns** said that the paragraph should establish that petitions to all other available non-judicial avenues had to have been resolved, rather than merely attempted, since, as it stood, the sentence could be interpreted as requiring only that such petitions had been lodged. For the same reason, the words "consideration of" should be inserted before the word "requests".

18. **The Chair**, noting the concern raised by Mr. Ben Achour, said she took it that the Committee wished to adopt the paragraph, subject to the amendments proposed by Mr. Santos Pais and Mr. Heyns.

19. *Paragraph 50, as amended, was adopted.*

Paragraph 51

20. **Mr. Shany** said that the purpose of paragraph 51, which overlapped to some extent with paragraph 50, was to expound on the obligation of States parties to allow persons sentenced to death to seek a pardon or a commutation of their sentence. The focus was slightly different, however.

21. The opposition to the paragraph expressed by the Government of the Russian Federation was based on a misunderstanding, while the Government of Japan, evidently concerned that a State party could be prevented from carrying out a death sentence by an infinite number of requests for pardons, had proposed revising the first sentence to address that apprehension. In a sense, however, the concern expressed by Japan was also based on a misunderstanding, as the Committee had maintained only that, if a procedure for requesting a pardon existed, executions should not be carried out until that procedure had been brought to a conclusion, not that States parties were required to consider as many requests for pardons as a person sentenced to death wished to submit. He nonetheless proposed adding the words "according to applicable procedures" to the end of the first sentence, which

would then read as followed: "States parties are required … to ensure that sentences are not carried out before requests for pardon or commutation have been meaningfully considered and conclusively decided upon according to applicable procedures."

22. **Mr. Ben Achour** said that he wondered whether paragraphs 50 and 51 did not overlap too much. Could a portion of paragraph 51 — the sentence referring to pardons, for instance — not be moved to paragraph 50?

23. **Mr. Shany** said that, although the two paragraphs did indeed overlap, one of the points of paragraph 51 was to close the loophole whereby a State party that sometimes granted pardons, but did not regulate the granting thereof by law, could execute a person without seeing its informal procedures for considering pardons through to completion. Looked at closely, paragraph 51 was clearly sufficiently different from paragraph 50 to justify retaining it.

24. **The Chair** said she took it that the Committee members wished to adopt paragraph 51 as orally amended by the Rapporteur.

25. *Paragraph 51, as amended, was adopted.*

Paragraph 52

26. **Mr. Shany** said that paragraph 52, which concerned the prohibition on executing pregnant women and persons who were minors at the time that they had committed a capital crime, had elicited a number of comments. In most of those comments, regret had been expressed that the Committee had deleted a reference, made in its initial draft, to the fetus carried by a pregnant woman who had been sentenced to death. That reference had been made to explain the Committee's reasoning; however, as a decision had been made not to use the general comment to go into detail on the Committee's reasons for its arguments, the reference had been deleted.

27. As currently worded, the first sentence of paragraph 51 could suggest that a State party whose courts sentenced a pregnant woman to death would be in breach of the Covenant. The Government of Japan had therefore made a proposal to bring the wording of that sentence into line with that of article 6 (5) of the Covenant, which stated that a sentence of death must not be imposed for crimes committed by persons below 18 years of age or carried out on pregnant women. The logic of that proposal would seem to be unassailable.

28. *Paragraph 52 was adopted on that understanding and with minor editorial changes.*

Paragraph 53

29. **Mr. Shany** said that paragraph 53, which touched on the categories of people who, because of their relatively limited ability to defend themselves, were at risk of being executed arbitrarily, had elicited a considerable number of comments. The Government of Japan, for instance, had objected to the idea that persons with "reduced" moral culpability should not be executed, as it suggested that someone whose culpability was in any way mitigated, even if only slightly, could not be executed. He proposed using the word "limited" rather than "reduced" in a bid to address that objection.

30. The Committee on the Rights of Persons with Disabilities had recommended that the paragraph should be redrafted. In that Committee's view, the duty to refrain from imposing the death penalty on persons with intellectual or psychosocial disabilities was grounded on the disproportionate and discriminatory denial of fair trial guarantees and procedural accommodations, not the belief that their limited mental capacity made it hard for them to defend themselves. Women Enabled International had proposed referring to the significant barriers faced by persons with disabilities rather than their limited ability to defend themselves. The International Disability Alliance and Human Rights Watch had submitted comments to much the same effect. Other non-governmental organizations (NGOs) had suggested adding references to victims of torture, gender-based violence and human trafficking to the list of victims of human rights violations that States parties should refrain from executing.

31. In the light of those comments, he proposed amending the first sentence of the paragraph so that it would read as followed: "States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psychosocial or intellectual disabilities impede their effective defence, and persons with limited moral culpability." He would welcome Committee members' views on the advisability of giving additional examples of the groups of persons who, as victims of serious human rights violations, should not be executed.

32. **Mr. Santos Pais** said that he would welcome a clarification of what was meant by moral culpability. In addition, he wondered for how long States parties would be expected to refrain from executing parents of "very young or dependent children" and whether it might be a good idea to tie the issue of such parents more closely to the issue of pregnant women that had been touched upon in the preceding paragraph.

33. **Mr. Fathalla** said that, in the last sentence, it was more than sufficient to indicate simply that States parties should refrain from executing victims of serious human rights violations. Examples of such victims were unnecessary. In reply to Mr. Santos Pais, he noted that the reference to parents could not be shifted to paragraph 52 because paragraph 51 referred to both mothers and fathers, whereas paragraph 51 referred only to pregnant women.

34. **Mr. Ben Achour** said that he wished to know whether the Committee's Views in the case cited in footnote 214, *Pratt and Morgan v. Jamaica*, had set a precedent whereby people who had been victims of serious human rights violations, such as victims of torture, were entitled to protection from the death penalty.

35. **Mr. Heyns** said that, although he was not opposed to including additional examples of categories of victims of serious rights violations in the last sentence, he would be reluctant to include victims of human trafficking unless the Committee could point to a death penalty case involving such a victim.

36. **Mr. Shany** said that understanding what was meant by moral culpability was no easy task. In the event, in the legal systems of a number of States, it was common practice for a person's inability to differentiate between right and wrong to mitigate his or her culpability. The intention of his proposed amendments to the first sentence of the paragraph was to reflect that practice — and indeed to encourage it — without stigmatizing persons with disabilities. It seemed to him that, while Mr. Santos Pais's observation concerning the linkage between the Committee's positions regarding the imposition of the death penalty on pregnant women and on the execution of parents of very young or dependent children was quite apposite, it did not seem advisable to merge the paragraphs for the reasons stated earlier. Mr. Fathalla's point that including examples of victims of serious human rights violations was unnecessary was well taken, and he proposed that the sentence should be ended immediately after "who have suffered in the past serious human rights violations".

37. *Pratt and Morgan v. Jamaica* had not dealt with torture as such. It was a death penalty case that had involved such serious violations of the right to a fair hearing that the Committee had been of the view that they had been tantamount to cruel, inhuman and degrading treatment. For instance, very shortly before their scheduled execution, Mr. Pratt and Mr. Morgan had won a reprieve but had not been informed of that fact. To proceed with plans to execute them after they had been thus toyed with, in the Committee's view, had been unacceptable. The Committee's Views in the case therefore went some way towards justifying the assertion that States parties should refrain from executing victims of serious human rights violations.

38. **Ms. Pazartzis**, noting that the case of *Pratt and Morgan v. Jamaica* dated back to 1986, asked whether it might not be better to cite a more recent case.

39. **Mr. Shany** said that, while he was unaware of any more recent cases, he would look into the matter.

40. *Paragraph 53, as amended, was adopted on that understanding.*

Paragraph 54

41. **Mr. Shany** said that the Government of Japan had proposed that the paragraph should be deleted in its entirety on the grounds that it would impose new obligations on States parties. The Government of the United States had also raised concerns about the paragraph. He recommended that the text should remain unchanged.

42. **Mr. Ben Achour** proposed that the phrase "de facto and de jure" in the first sentence should be deleted, as the death penalty could only be abolished "de jure". To his mind, the qualifier "de facto" could only apply to a moratorium on the death penalty. He submitted that the concept of "de facto" abolition did not exist.

43. **Mr. Heyns** said that the qualifier "de facto and de jure" did not strike him as incorrect, bearing in mind that States parties themselves often distinguished between "de facto" and "de jure" abolition. In many cases, "de facto" abolition was a positive first step towards "de jure" abolition. He proposed that the phrase should be retained and that the phrase "rate and extent in which" in the last sentence should be revised.

44. **Mr. Fathalla** said that the Committee should perhaps consider addressing the concerns raised by the Governments of Japan and the United States, particularly as article 6 of the Covenant did not refer to the complete abolition of the death penalty but to the restrictions that States parties should apply on its imposition. With that in mind, he proposed that the first sentence of the paragraph should be deleted in its entirety.

45. **The Chair** said that, although article 6 did not require States parties to abolish the death penalty, it did require them to take steps towards that goal.

46. **Mr. Politi** said that, at the outset of the drafting process, the Committee had been quite firm in its position that the complete abolition of the death penalty should be one of the core principles of the general comment. In his view, it would be wrong to delete the first sentence of the paragraph in the absence of a proper discussion.

47. **Mr. Shany** said that it was not the Committee's position that States parties that applied the death penalty were violating the Covenant. The Covenant did, however, place States parties firmly on the path towards abolition. The first sentence of the paragraph should therefore be retained. However, in order to address the issue raised by Mr. Ben Achour, the term "abolition" could be replaced with the term "eradication", which was more general. The phrase "de facto and de jure" should be retained in order to account for the fact that some States parties were moving towards a de facto moratorium on the death penalty while others were moving towards its legal abolition. The phrase "rate and extent in which" in the last sentence referred to the frequency with which the death penalty was imposed and how many people were put to death in any given period of time. The phrase should be retained, subject to minor editorial changes.

48. **Mr. Ben Achour** said that, while he agreed with the proposal to replace the term "abolition" with the term "eradication", he still found the phrase "de facto and de jure" to be problematic, as he failed to see how States parties could simultaneously eradicate the death penalty de facto and de jure. In the majority of cases, the act of eradicating the death penalty de facto necessarily preceded that of eradicating it de jure. The Committee might consider amending the phrase to read either "de facto and eventually de jure" or "de facto or de jure" to account for that fact.

49. **The Chair** said that it was not unheard of for a decision to have been taken to eradicate some forms of the death penalty de jure and others de facto at one and the same time. Moreover, in a federal system of government, practices could vary from state to state.

50. **Mr. Shany** said that, if Mr. Ben Achour's proposed amendment were to be taken up, the sentence would no longer cover situations in which States parties decided to eradicate some forms of the death penalty de jure and others de facto, or in which states within a federal system might decide to adopt a blended approach to eradication. Even though the phrase "de facto and de jure" was slightly ambiguous, he could see no better way of covering all eventualities.

51. *Paragraph 54, as amended, was adopted with minor drafting changes.*

Paragraph 55

52. **Mr. Shany**, summarizing the content and scope of the paragraph, said that the Governments of Canada, Namibia and New Zealand had all expressed their support for it. The Governments of Namibia and New Zealand had also asked the Committee to cite the report of the United Nations High Commissioner for Human Rights on the high-level panel discussion on the question of the death penalty (A/HRC/36/27), which referred to the emerging international consensus that the death penalty was a form of torture or other cruel, inhuman or degrading treatment or punishment. To his mind, that request should be accommodated. The Government of France had also expressed its support for the paragraph and had asked the Committee to give it a more prominent position in the text. The Committee had discussed the issue and had decided that it was not necessary to rearrange the text at that time. The Government of Japan had proposed that the paragraph should be deleted altogether on the grounds that no international consensus existed on the matter. The Committee had never claimed that such a consensus existed; the text merely referred to the perception that there was growing international agreement that the death penalty was contrary to article 7 of the Covenant. The Government of Turkey had asked the Committee to review the paragraph as a whole, while the Governments of the Russian Federation and the United States had pointed out that placing a moratorium on the death penalty did not necessarily imply that States considered it to run counter to article 7.

53. With that in mind, he proposed that the word "has" in the phrase "considerable progress has been made" in the latter part of the second sentence should be replaced with the words "may have" to avoid making a factual claim. A Committee member had likewise proposed that the words "ratifications of" at the start of the second sentence should be replaced by the words "States parties to" and that the following clause should be made grammatically consistent with the first.

54. **Mr. Heyns** said that the paragraph was well-placed in the text and had been carefully worded to reflect the current state of affairs. A considerable number of States had abolished the death penalty over the previous 20 years, and fewer executions were taking place in states within federal systems where the death penalty was still in force. He noted with satisfaction that the wording of the paragraph was closely aligned with the language used in general comment No. 3 on the African Charter on Human and Peoples' Rights: the Right to Life (article 4) of the African Commission on Human and Peoples' Rights.

55. **Mr. de Frouville** said that the amendment proposed by Mr. Shany was not strictly necessary and seemed overcautious, as it was a fact that considerable progress had been made.

56. **Mr. Fathalla** said that he supported the proposal to replace the words "ratifications of" with "States parties to".

57. **Mr. Shany** said that a reference to general comment No. 3 of the African Commission on Human and Peoples' Rights could be included in the paragraph in order to provide a point of comparison, particularly as the death penalty was still in force in several African countries. In his view, replacing the word "has" with the words "may have" would be the safer option, as it was not for the Committee to read too much into why States had decided to ratify the international instruments mentioned in the paragraph or to presume that their decision to do so amounted to progress towards building a consensus that the death penalty should be considered to be a cruel, inhuman or degrading form of punishment.

58. **The Chair** said she took it that there were no objections to the amendments proposed by Mr. Shany.

59. *Paragraph 55, as amended, was adopted.*

Paragraph 56

60. **Mr. Shany** said that the Governments of Canada and Australia had cautioned the Committee against implying that every human right should be read into article 6. That was not, in any case, the Committee's position. The Government of Japan had proposed that the last sentence of the paragraph should be modified to specify that perpetrators of one of the

most serious crimes, such as murder, could be subject to capital punishment even if the act of murder had also been found to constitute a form of expression. The Government of the Russian Federation had questioned whether, in reality, the death penalty had ever been imposed in response to the exercise of freedom of expression. The Committee knew that to be the case, as it had dealt with numerous cases concerning States in which apostasy was classified as a capital offence. He did not consider that objection to be valid.

61. The Expert Mechanism on the Rights of Indigenous Peoples had asked the Committee to mention the situation of indigenous peoples. He was doubtful about the appropriateness or feasibility of including such a reference. Amnesty International had likewise suggested that the Committee should make reference to economic, social and cultural rights. The Committee had already acceded to that request by having alluded to those rights in paragraph 30. He did not recommend that any changes should be made to the paragraph.

62. **Mr. de Frouville** said that he was not wholly convinced that the application of the death penalty for a crime not constituting a most serious crime would violate both article 6 (2) and article 7 of the Covenant. The link between the two articles was not self-evident and was not supported by any reference to the Committee's jurisprudence. He was not, however, against the inclusion of that sentence.

63. **Mr. Heyns** said that the phrase "the most serious crime" in the third sentence should be modified to read "a most serious crime".

64. **Mr. Shany** said that he did not agree with Mr. de Frouville's position on the link between article 6 and article 7 of the Covenant. In his view, one of the elements that transformed a punishment into a cruel, inhuman or degrading punishment was a lack of proportionality between the seriousness of the offence and the gravity of the sentence imposed. There were compelling reasons to consider the imposition of the death penalty for a crime that was not a most serious crime to be a disproportionate application of criminal law, which could constitute a violation of article 7.

65. **Mr. de Frouville** said that the reasoning put forward by Mr. Shany should be explicitly expounded in the text and that appropriate references should be added to support the statement made in the third sentence.

66. **Mr. Shany** said that he would prepare a revised version of paragraph 56 in the light of the observations made by Mr. de Frouville.

The meeting rose at 4.55 p.m.